No. SC95094

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

CLAUDE CHAMBERS,

Appellant.

Appeal from Crawford County Circuit Court
Forty-Second Judicial Circuit, Division Two
The Honorable Kelly W. Parker, Judge

SUBSTITUTE RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant, Claude Chambers, was charged in the Circuit Court of Crawford County with statutory sodomy in the first degree (L.F. 9). The information alleged that appellant was a prior and persistent offender (L.F. 9). On December 9, 2013, before the trial began, appellant waived his right to an attorney and his right to be present at trial (Tr. 67-73). Thereafter, appellant was tried before a jury, the Honorable Kelly Parker presiding (Tr. 85-143). Appellant challenges the sufficiency of the evidence. Viewed in the light most favorable to the trial court's judgment, the following evidence was adduced at trial:

C.R. was born on July 9, 2003 (Tr. 116). In 2010, C.R. lived with his mother and appellant, his step-father, in Cuba, Missouri (Tr. 116-117). Appellant usually woke up C.R. in the mornings to send him to school (Tr. 117). Appellant made C.R. watch "nasty movies" (Tr. 117). Appellant pulled down his pants and made C.R. pull down C.R.'s pants (Tr. 117). Appellant made C.R. sit on appellant's lap and placed his penis in C.R.'s anus (Tr. 118). C.R. told his teacher, and she notified law enforcement (Tr. 121-122).

C.R. was interviewed at the Child Advocacy Center (Tr. 127). C.R. described how appellant put his penis in C.R.'s "butt" (Tr. 129-130, State's Exhibit 4). C.R. said that this happened several times (Tr. 129-130, State's Exhibit 4).

At the close of all the evidence, the jury found appellant guilty of statutory sodomy in the first degree (Tr. 143). The court sentenced appellant to thirty years in the Missouri Department of Corrections (Tr. 156).

On May 18, 2005, the Court of Appeals reversed appellant's conviction and remanded the case for a new trial. State v. Chambers, SD33243 (Mo. App., S.D. May 15, 2015). On August 18, 2015, this Court granted Respondent's application for transfer of the case to this Court pursuant to Rule 83.04.

This appeal followed.

ARGUMENT

I.

There was sufficient evidence to support appellant's conviction for statutory sodomy in the first degree.

In his first point, appellant claims that the evidence was insufficient to show that appellant placed an object in C.R.'s anus (App. Br. 16-28).

In a challenge to the sufficiency of the evidence, the appellate court views the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the verdict and disregards all contrary evidence and inferences. *State v. Battle*, 415 S.W.3d 783, 788 (Mo. App., E.D. 2013). The Court affirms the conviction if the evidence was sufficient for a reasonable person to find the defendant guilty beyond a reasonable doubt. *Id.*

A person commits statutory sodomy in the first degree when he has deviate sexual intercourse with a person less than fourteen years old. §566.062 "Deviate sexual intercourse" is defined as "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument, or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim." §566.010(1). There are two categories of acts that constitute deviate sexual intercourse: (1) any act involving the

genitals of one person and the hand, mouth, tongue or anus of another person and (2) a sexual act involving the penetration of the sex organ or anus by a finger, instrument or object. *Soto v. State*, 226 S.W.3d 164, 166 (Mo. banc 2007).

The evidence in the present case supported a finding that appellant committed deviate sexual intercourse because he penetrated the victim's anus with his penis (Tr. 121-122). *See State v. Copeland*, 95 S.W.3d 196, 199-200 (Mo. App., S.D. 2003) (the evidence supported a finding that the defendant committed statutory sodomy in the first degree because he penetrated the victim's anus with his fingers and/or with his penis).

Appellant argues that the state charged him with penetrating C.R.'s anus with an object, and that there was no evidence that he penetrated C.R.'s anus with any object (App. Br. 22-23). But the term "object" as used in the statute is broad and there is no reason to believe that the legislature sought to exclude penis from the term "object" in section 566.010(1). It would not be logical to believe that a defendant would be convicted of statutory sodomy for penetrating the victim's anus with an inanimate object but to allow him to escape responsibility for penetrating the victim's anus with an animate object such as his penis. *See State v. Spence*, 764 S.E.2d 670, 678 (N.C. Ct.App. 2014) (the North Carolina statute proscribing "the penetration, however slight, by any object into the genital or anal opening of another person's body"

proscribed penetration by the parts of the human body as well as inanimate or foreign objects).

Additionally, Section 566.010(1) provides that deviate sexual intercourse can be committed by "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person." §566.010(1). It is unreasonable to believe that the legislature intended to punish a penile to anal contact but to exclude penile penetration of a person's anus. By inserting his penis in C.R.'s anus, appellant necessarily touched C.R.'s anus with his penis, which is sufficient under the statute to support a conviction for statutory sodomy. The evidence was sufficient to support appellant's conviction for statutory sodomy in the first degree.

To the extent that appellant argues that he could not be convicted of any other means of committing deviate sexual intercourse than the manner set in the jury instruction, i.e. inserting an object in C.R.'s anus, this argument is an attack of the verdict director, not on the sufficiency of the evidence (App. Br. 21-22). Appellant did not object to Instruction No. 5 requiring the jury to find that appellant penetrated C.R's anus with an object, and his claim is not preserved for review. An instructional error seldom rises to the level of plain error. *State v. Cates*, 3 S.W.3d 369, 372 (Mo. App., S.D. 1999). To show that the trial court plainly erred in submitting a jury instruction, appellant must go beyond a demonstration of mere

prejudice, and must establish that the trial judge so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice. *Id*. Manifest injustice or miscarriage of justice will result only if it is apparent that the jury's verdict was tainted by the instructional error. *Id*. It has been held that no manifest injustice or miscarriage of justice results from the trial court's failure to correctly instruct the jury on an element of the crime that was not in dispute. *Id*.

Appellant cannot show that Instruction No. 5 so misdirected the jury that it caused manifest injustice or a miscarriage of justice. The instruction properly defined "deviate sexual intercourse" (L.F. 33). The jury would have known that the "object" appellant inserted in C.R.'s anus was appellant's penis. There was no evidence that appellant inserted anything else in C.R.'s anus. Thus, appellant cannot show that the instruction so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice.

Appellant's claim should be denied.

II.

The trial court did not abuse its discretion in overruling appellant's motion for automatic change of venue.

In his second point, appellant claims that the trial court abused its discretion in denying appellant's motion for automatic change of venue under Rule 32.03 (App. Br. 29-39).

Facts

On March 12, 2013, the state filed an information in Crawford County, charging appellant with statutory sodomy in the first degree (L.F. 1). On March 19, 2013, appellant waived formal arraignment and entered a plea of not guilty (L.F. 1). On the same day, he filed a timely motion for automatic change of venue (L.F. 1, 8).

On March 25, 2013, the court continued the case to April 16, 2013, to hear all pending motions (L.F. 2, Tr. 43). On April 16, 2013, the prosecutor appeared, and appellant appeared in person and with a new attorney (L.F. 2). The court scheduled a hearing on the admissibility of the victim's statements pursuant to Section 491.075 for May 22, 2013 (Tr. 5-6, 43-44).

On May 22, 2013, the court held a hearing pursuant to Section 491.075 RSMo and set the case for a case review on June 19, 2013 (L.F. 2, Tr. 8-36). The motion for change of venue was not brought to the court's attention (Tr.

38-40, 43). Without an objection by appellant, the court set the trial date for December 9, 2013 (Tr. 38-40).

On November 19, 2013, appellant appeared before the court with counsel (Tr. 41). The court asked appellant if there were any motions the court needed to hear on appellant's behalf (Tr. 41). Appellant stated that he had "depositions scheduled for Thursday" and agreed that the cause should remain on the docket for trial on December 9, 2013 (Tr. 41).

Appellant conducted depositions on November 21, 2013 (Tr. 45).

On December 5, 2013, the court had a telephone conference on appellant's motion for continuance (Tr. 45). The court overruled appellant's motion (Tr. 45). On December 8, 2013, the Sunday before trial, appellant called the court to inform the court that there was a pending motion for change of venue that had not been ruled on, and he again requested a continuance (Tr. 45). The court contacted the prosecutor that evening regarding appellant's motions, and the prosecutor suggested that the court hold a hearing in the morning prior to trial (Tr. 45).

On December 9, 2013, the first day of trial, the court heard argument on appellant's motion for change of venue (Tr. 41). Appellant argued that pursuant to *Matthews v. State of Missouri*, 175 S.W.3d 110 (Mo. banc 2013), the court had no discretion and that it had to grant appellant's motion for change of venue (Tr. 45-46). The prosecutor argued that appellant waived his

motion for change of venue by consenting to a trial in Crawford County (Tr. 47). The court found that appellant waived his right to an automatic change of venue by not raising the issue of venue until the day before trial (Tr. 47-48).

The court further found that appellant used his motion for change of venue to circumvent the court's ruling denying his motion for continuance (Tr. 47-48).

Analysis

Rule 32.03 provides as follows:

(a) A change of venue shall be ordered in any criminal proceeding triable by a jury pending in a county having seventy-five thousand or fewer inhabitants upon the filing of a written application therefor by the defendant. In felony and misdemeanor cases the application must be filed not later than ten days after the initial plea is entered. The defendant need not allege or prove any reason for change. The application need not be verified and shall be signed by the defendant or the defendant's attorney.

(b) A copy of the application and notice of the time when it will be presented in the court shall be served on all parties.

(c) If a timely application is filed, the court immediately shall order the case transferred to some other county convenient to the parties for trial by jury, first giving all parties an opportunity to make suggestions as to where

the case should be sent. In lieu of transferring the case to another county, the court may secure a jury from another county as provided by law.

The right to an automatic change of venue under section 32.03 is a statutory privilege that may be waived expressly or by acts and conduct. *State v. Bradshaw*, 81 S.W.3d 14, 28 (Mo. App., W.D. 2002). In *State v. Bradshaw*, the Court found that the defendant who proceeded to trial without objecting to the court's failure to rule on his motion for change of venue waived his right to an automatic change of venue under Rule 32.03. *Id.* at 28.

Similarly, in the present case, appellant never called his motion for change of venue to the court's attention, and he only sought a ruling after a jury panel and witnesses had come to court on the day of trial. Appellant had several opportunities to request a ruling on his motion for change of venue in the nine months during which the motion was pending (L.F. 2, Tr. 36-37, 41-48). The court held three pretrial hearings, but appellant did not seek a ruling on his motion (L.F. 2, Tr. 36-37, 41-48). Having forgone three opportunities to seek ruling on his motion, appellant waived his right to an automatic change of venue.

To allow appellant to assert his right to change of venue after the court had ruled on various pretrial matters would defeat the purpose of Rule 32.03. As the Court observed in *State v. Bradshaw*, a broad rule that allows a defendant to seek a change of venue at any time before double jeopardy

attaches "would permit a defendant to fail to call the trial court's attention to a pending motion for change of venue, proceed with jury selection and, then, if dissatisfied with the resulting jurors, object to venue." 81 S.W.3d at 28. Here, appellant stood silent when the court held three pretrial hearings and ruled on the state's motion to admit witnesses' statements pursuant to Section 491.075. It was not until the trial court denied appellant's motion for continuance that appellant requested a ruling on his motion for a change of venue that had been pending for nine months (Tr. 43-48). In denying appellant's motion, the trial court observed that it "cannot allow a defendant to argue a motion for continuance that was denied and then scramble around the day before trial to figure out a way to get the case continued and find a motion for change of venue that was filed and bring it up the day before trial to a jury." (Tr. 48). Appellant had many opportunities to bring his motion for change of venue to the court's attention, but he decided not to do it until the eve of trial, after the court denied his motion for continuance. Under the circumstances of this case, the trial court correctly denied appellant's motion for change of venue because appellant used his motion as a means to circumvent the court's ruling on the continuance and to delay trial.

Furthermore, Rule 32.03(b) requires the defendant to provide a notice "of the time when [the application for change of venue] will be presented in court." The purpose of such notice is to allow the opposing party the

opportunity to contest the application. *See State ex rel. Director of Revenue v. Scott*, 919 S.W.2d 246, 248-249 (Mo. banc 1996) (interpreting similar requirement of notice under Rule 51.05 change of judge). While the failure to include notice of a date for the hearing may not be fatal if the application was otherwise timely filed and timely served upon the opposing party, and a hearing was held during which the opposing party had an opportunity to contest the application, the prosecutor in the present case did not have an opportunity to contest the late ruling on the motion for change of venue because it was taken at the outset of trial with jurors and witnesses ready for trial. *See Id.* (the failure to include a notice of a date of hearing on motion for change of judge was not fatal where a hearing was held, the opposing party had an opportunity to contest the motion and "no other cause for denying was presented or apparent to the judge"). Appellant's unexplained delay of nine months before seeking a hearing on his motion was a cause for denial apparent to the judge. The trial court did not abuse its discretion in finding that appellant waived his right to an automatic change of venue.

Moreover, "Rule 32.03 does not create any presumption that a defendant cannot receive a fair trial in counties having seventy-five thousand or fewer inhabitants." *Moss v. State*, 10 S.W.3d 508, 513 (Mo. banc 2000). "It merely recognizes a defendant's ability to secure a fair trial in small counties is often contested and affords a defendant the right to change venue as a

matter of convenience." *Id.* The rule affords the defendant the opportunity to seek an automatic change of venue for ten days only, and after the expiration of the ten-day period, the defendant must show good cause for change of venue. Rule 32.03. The limited time allowed under the rule for an automatic change of venue recognizes that an automatic change of venue is not an absolute right and no prejudice is presumed. Appellant does not allege that he was not afforded a fair trial and impartial jury. Thus, appellant cannot show prejudice from the denial of his motion. Appellant's claim should be denied.

III.

The trial court did not abuse its discretion in denying appellant's motion for continuance.

In his third point, appellant claims that the trial court abused its discretion in denying appellant's motion for continuance (App. Br. 34-49).

Facts

On March 19, 2013, appellant waived formal arraignment and entered a plea of not guilty (L.F. 1). On March 25, 2013, the court set the case for April 16, 2013, for a hearing on all pending motions (L.F. 2, Tr. 43). On April 16, 2013, the prosecutor appeared, and appellant appeared in person and with a new attorney (L.F. 2). The court scheduled a hearing on the

admissibility of the victim's statements pursuant to Section 491.075 for May 22, 2013 (Tr. 5-6, 43-44).

On May 22, 2013, the court held a hearing pursuant to Section 491.075 RSMo and set the case for a case review on June 19, 2013 (L.F. 2, Tr. 8-36). Without an objection by appellant, the court set the trial date for December 9, 2013 (Tr. 38-40).

On November 18, 2013, appellant filed a motion for continuance (L.F. 12-13). Appellant's motion stated that counsel needed additional time to prepare (L.F. 12-13).

On November 19, 2013, appellant appeared before the court with counsel (Tr. 41). The court asked appellant if there were any motions the court needed to hear on appellant's behalf (Tr. 41). Defense counsel stated that he had "depositions scheduled for Thursday" and that he was not going to argue his pending motion for continuance (Tr. 41, 44). The court replied, "The cause is to remain for trial?" and defense counsel responded, "Yes sir" (Tr. 41).

On December 5, 2013, appellant filed an "Amended motion for continuance" (L.F. 14-17). Appellant stated in his motion that he conducted depositions of the state's witnesses on November 21, 2013 (L.F. 14). According to appellant's motion, the victim indicated during the deposition that he had been repeatedly sodomized by appellant (L.F. 15). Appellant

wanted additional time to consult an expert about the likelihood of physical injury and behavioral effects of such acts (L.F. 15). Appellant's motion stated that he wanted to contact Dr. Samuel Brayfield, but that he had not had time for a consultation (L.F. 15).

Appellant's motion further stated that during the deposition, the victim indicated that he did not reveal the abuse because appellant was always present at his home (L.F. 15). Counsel wanted more time to obtain appellant's employment records and to interview witnesses to refute the victim's statements (L.F. 15).

Appellant's motion further asserted that during an interview with Anna Tucker, a worker for the Children's Division, appellant learned that the Children's Division had records concerning the victim, and that the records could be provided, but a redaction would take several weeks (L.F. 15). Appellant stated that the Children's Division provided various documents showing that the victim had mental health issues and that he had set a fire that burned down the apartment building in which he lived (L.F. 15). Appellant alleged that he learned that the victim had been expelled from school for discipline problems (L.F. 16-17). Appellant wanted more time to obtain the records from the Children's Division and the victim's school records (L.F. 15-17).

On December 5, 2013, during a phone conference with defense counsel, the court overruled appellant's motion for continuance (Tr. 42). The court told defense counsel that the court would give him an opportunity to make a record (Tr. 42).

On December 6, 2013, appellant filed a memorandum pro se, stating that he was firing counsel (Tr. 45, L.F. 3, 19).

On December 9, 2013, the first day of trial, appellant's attorney filed a second amended motion for continuance (L.F. 20-24). The court allowed counsel to argue his motion for continuance (Tr. 48). Counsel stated that he received only a portion of the records from the Children's Division and that he expected to receive more records from the Children's Division when the records were redacted (Tr. 48-49). Counsel said that a number of reports he received during discovery referenced documents from the Children's Division regarding excessive discipline, failure to give C.R. medication, an unsubstantiated complaint about red marks, welts, and bruises, and reports about referrals to the Children's Division (Tr. 49-50). Counsel stated that he expected to receive reports regarding unsanitary living conditions, lack of supervision, and "physical abuse" (Tr. 50). Counsel said that he learned in a deposition about a fire set by C.R. and that the reports from the Children's Division contained a letter from the fire chief that might reference other fires (Tr. 50-51). Counsel argued:

We have to be able to get into those reports and find out what's in there. It's, I mean it's hard for me to tell you. I'm just telling you what is kind of like the tip of the iceb[e]rg. I'm just telling you what we know about and that, that's before we get a chance to investigate what we get from the children's division. Once we get the reports I'll be able to tell you what all is in there that we can use. You don't know what you're going to find out. What I'm telling you is what I believe we can find out just based on referrals from other reports.

(L.F. 51).

Counsel further told the court that he needed time to investigate witnesses who would testify that appellant managed an apartment complex (Tr. 52). Counsel argued that there were discrepancies between C.R.'s statements at the Child Advocacy Center interview and his statements in a deposition, that he needed to obtain school records to impeach C.R.'s credibility, and that he needed to consult an expert regarding C.R.'s behavioral problems (Tr. 52-56). Counsel stated that he learned most of this information during a deposition on November 21, 2013 (Tr. 58). The court stated the following:

THE COURT: One of the overriding concerns that I have is, rolling around in my mind is how effective would our judicial system be if the courts were to allow defendants to wait on a regular basis twenty days prior to trial

to do their depositions in every case, learn new stuff and get continuances. We'd never have trials. We would never have final dispositions of cases. If the depositions would have been done in October or September or August or July or June, after this case was set for trial and that's what I'm primarily looking at, at this stage, but you couldn't have done this discovery all the way back into March, April, May, all the way up to the time it was set.

[DEFENSE COUNSEL]: Judge you talk about June, July, August, September, October. I have basically tried two cases a month jury trials all through that time period and you know I can look back and say yeah there was time there but I don't know where that time, that time had to be applied to the case at hand.

THE COURT: Well I understand that you came into the system here and took over when Mr. Younker left and I think I have been very accommodating with some of the requests for continuances and as I was doing that I realized that I was allowing the tail to wag the dog. I can no longer continue to do that.

[DEFENSE COUNSEL]: Well judge what I've done, we have taken the cases that have been going on and we have spread them through the spring to where we can try them all and just recently the, the office has reduced the number of new cases that I'm getting so that I can concentrate on these, on preparing for these trials. So, so I mean that was what we did back in April is

we piled everything into one, we piled everything up into a very small time period and me not knowing the cases and not knowing practically all these cases are going to actually be trials, that was okay because you know you set several cases on one day or right close together and then well all those cases end up guilty pleas and you don't have to try cases real close together in fact. Once I find out what, which cases are going to trial which are a heck of a lot of them, we have them spread out to where we can try them and it's a situation that really wasn't anybody's fault except the people come into the system and they don't stay very long and they get passed and don't get tried until it created a big pile of cases that are going to trial. So I'm, I'm not, I mean this case is a first setting. If this case had been continued even once before then couldn't offer you any kind of reasonable argument why we're not ready. But that's the situation here.

THE COURT: Okay. Mr. Seay [prosecutor].

[PROSECUTOR]: Well judge, [second-chair prosecutor] has aptly made the point, when we created the system of having a last date to plea what we did is say roughly thirty days down the line we're going to set it for trial and when we stand up and say it's going to go to trial then I think that's what we all assume is going to take place. It's going to get tried. And I realize there's a big difference in what I have to do to prepare as opposed to what they have to do to prepare and I have no doubt after his conversation with Anna Tucker

that there may be records that he doesn't have but they are records that I didn't have and don't feel pertinent to the particular case at hand. Grasping for straws.

Also I don't know, I know how the public defender system works. He doesn't know if he's going to be able to hire an expert or not. Just because he says he wants to get one doesn't mean they are going to let him do it. They have to get permission to do depositions these days. So just because he says he wants to get an expert doesn't mean that's going to happen. My assumption is when you stand up and say it's going to go to trial that we're going to go to trial and I'm here for trial and I have witnesses coming and I'm ready to proceed.

THE COURT: It's the court's expectation when we set the matter for trial that it's going to go to trial and that everybody's going to be working diligently to prepare for trial until the trial date and we set that on June 19th of 2013 for today. Substantial amount of time to get ready and prepare for trial. The motion for, second amended motion for continuance is overruled and denied.

(Tr. 58-61).

Analysis

"The decision to grant a continuance is within the sound discretion of the trial court." *State v. Christenson,* 50 S.W.3d 251, 261 (Mo. banc 2001). A

reversal is warranted only upon a very strong showing that the trial court abused its discretion and that prejudice resulted. *Id.* "The party requesting the continuance bears the burden of proving prejudice." *State v. Fassero*, 307 S.W.3d 669, 676 (Mo. banc 2010). Inadequate preparation is not grounds for a continuance where there has been ample opportunity to prepare. *State v. Slage*, 206 S.W.3d 404, 408 (Mo. App., W.D. 2006).

Appellant failed to make the required very strong showing of an abuse of discretion resulting in prejudice. Trial counsel represented appellant at least since April 16, 2013, almost eight months before trial (L.F. 2). The trial court set the trial date on June 19, 2013, without an objection by trial counsel (Tr. 38-40). On November 19, 2013, twenty days before trial, the court asked counsel again whether the case should remain on the docket for December 9, 2013, and counsel said, "Yes" (Tr. 41). Despite being aware of the December 9, 2013, trial date since June, trial counsel did not schedule depositions until November 21, 2013 (L.F. 10-11). There was no allegation that appellant did not know about the witnesses or that the witnesses were unavailable for depositions earlier.

In *State v. Millsap*, 244 S.W.3d 786, 790-791 (Mo. App., S.D. 2008), the Court found that there was no abuse of discretion in denying the defendant's motion for continuance where defense counsel represented the defendant for

six month prior to trial, giving her an ample opportunity to prepare and subpoena a witness.

Similarly, in the present case, counsel represented appellant for almost eight months prior to trial, and he knew about the trial date for five months before the trial began. Twenty days before trial, counsel had no objection to proceeding with the previously scheduled trial date (Tr. 41). Inadequate preparation is not grounds for a continuance where there has been ample opportunity to prepare. *State v. Slage*, 206 S.W.3d 404, 408 (Mo. App., W.D. 2006).

While defense counsel contended that he could not depose the witnesses earlier because he had a large case load, this contention does not show that there was not an adequate opportunity to prepare when counsel was on the case for almost eight months (Tr. 58-61). And even after completing the deposition on November 21, 2013, appellant had an additional 18 days before the trial began. *See State v. Lumpkins*, 348 S.W.3d 135, 141 (Mo. App., W.D. 2011) (the trial court did not abuse its discretion in denying the defense motion for continuance where the defense had almost a month after the denial to prepare for trial). The trial court acted within its discretion in denying appellant's motion for continuance.

Furthermore, appellant failed to make the necessary showing of prejudice. Appellant's contention that he needed additional time to secure

witnesses and to discover favorable evidence is speculative. Appellant never identified any witnesses he would call had he been given more time. Appellant mentioned in his motion for continuance that he wanted to consult Dr. Samuel Brayfield regarding the victim's behavior (L.F. 14-17). But this motion was filed four days before the trial, and appellant had not consulted this expert yet (L.F. 14-17). On the day of trial, appellant did not tell the court that he anticipated consulting Dr. Samuel Brayfield any time soon, and he never told the court that Dr. Brayfield would be available to testify if appellant was granted a continuance (L.F. 14-17, Tr. 52-56). "If a continuance is not likely to result in the presence of the witness at trial, the court will not be held to have abused its discretion in denying the continuance." *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004).

Appellant further wanted more time to review redacted records from the Children's Division, but he did not tell the court what evidence he expected to develop from the records. The prosecutor told the court that he did not have the records from Children's Division, and that he did not believe that they were relevant (Tr. 58-61). The state did not use such records at trial. Appellant cannot show prejudice relying on a hunch that the records could produce some helpful information was properly denied. *See State v. Benedict*, 319 S.W.3d 483, 488 (Mo. App., S.D. 2010) (the defendant's argument that continuance was necessary because "he might have found a

defense" did not show what evidence he would have developed had a continuance been granted, and did not show prejudice from the denial of the continuance). Appellant's claim should be denied.

CONCLUSION

For the foregoing reasons, appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and contains 5,428 words as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 19th day of October, 2015, to:

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